Index to Appendices

Page

Appendix A—Judgments:

1. Memorandum Opinion of the Superior Court 1
2. Findings of Fact and Conclusions of Law of the Superior Court 7
3. Judgment of the Superior Court 11
4. Opinion of the District Court of Appeal 13
5. Order of District Court of Appeal Denying Petition for Rehearing 34
6. Order of Supreme Court of the State of California Denying Petition for Hearing 35

Appendix B—Constitutional Provisions and Statutes Which the Case Involves:

1. Constitution of the United States, Section 8, Clause 3 .. 37
2. Constitution of the United States, Amendment XIV, Section 1 37
3. Title 28 U.S.C., Judiciary and Judicial Procedure, Section 1257 37
4. Fair Labor Standards Act (Title 29 U.S.C., Labor, Chapter 8, Secs. 207, 213, 216) 38
5. Motor Carrier Act of 1935 (Title 49 U.S.C., Transportation, Interstate Commerce Act, Part II, Sections 302 and 304) 39
6. Portal to Portal Pay Act of 1947 (Title 29 U.S.C., Labor, Chapter 9, Secs. 255 and 260) 40
7. Code of Federal Regulations Title 29, Labor, Appendix, Chapter 5, Secs. 778.2 (c), (d) and Section 785.0(a)* .. 41

*Also contained in Title 29, Code of Federal Regulations, Section 785.0, until that section was renumbered as 785.1 by 26 Federal Regulations 7732, August 18, 1961, and the language slightly changed, but not in such manner as to affect this litigation.

Appendix A

[Title of Court and Cause]

MEMORANDUM OPINION AND ORDER FOR FINDINGS

This is an action brought by the plaintiffs against the defendants for overtime compensation under the Fair Labor Standards Act. It is conceded by the defendants that their operation is covered by the Fair Labor Standards Act unless they come within the Motor Carrier Exemption found in Section 13 of the Act.

It has been conceded by the plaintiffs that they were employed by defendants in interstate commerce prior to the year 1959. The effect of this pre 1959 activity in interstate commerce will be discussed later in this opinion. Likewise, there is no basic fact conflict as to the nature of the operation during 1959 and 1960. The basic dispute is whether or not the facts as conceded bring the shipments under the provisions of the Motor Carrier Act. During the year 1959-60 the defendants shipped lumber by two different means and each of the plaintiffs was involved in each of the methods of shipping. The first method used by the defendants for shipping their lumber was to haul it from their mill over private roads to the railroad where the lumber was loaded on railroad cars and shipped out of state, and admittedly in interstate commerce. Each of the plaintiffs claimed that they drove trucks from the mill to the railroad entirely on a private road. It was conceded that some trucks may from time to time have used a portion of U. S. Highway 101, but that this was a negligible part of the trip and that most of the

trucks did not use this route. There is no testimony to contradict the plaintiffs' claim that they did not traverse U. S. Highway 101 in making deliveries to the railroad. It is contended by the defendants, however, that because the plaintiffs went under Highway 101 they thereby somehow became involved with a public highway which brings them within the provisions of the Motor Carrier Act. The Court is not persuaded that this is so and feels that this portion of the transportation clearly comes within the holding in 34 motor carrier cases, Interstate Commerce 556, cited in the plaintiffs' brief.

It is the finding of the Court, therefore, that such shipments did not bring the plaintiffs within the scope of the Motor Carriers Act and, hence, outside the application of the Fair Labor Standards Act.

The other type of shipment by the defendants during 1959 and 1960 was a truck haul from the defendants' sawmill over the public highways to wholesale and retail lumber yards, where the lumber was unloaded from the truck, held in the yard, and later trans-shipped to other points. The evidence does not show that the defendants intended that the lumber be shipped out of state upon reaching its California destination, nor did they intend that it remain in the state. It seems apparent to the Court that their primary concern was with selling it, and that its disposition after delivery by them was entirely within the discretion of the buyer of the lumber, and that it cannot be held that these hauls from the defendants' mill to the lumber yard were in interstate commerce.

It seems to the Court that these shipments were similar to those described in Dallum vs. Farmers Cooperative Trucking Association, 47 F. Supp. 785, 789, where the Court said:

> "Apparently it was the plan and intention of the National Butter Company to store the butter at St. Paul until such time as transportation thereof to customers could be made. No further movement of any particular part to any particular person was contemplated. Delivery depended upon the demand of the customers of the National Butter Company."

The Court went on to indicate that under these circumstances the local transportation was not in Interstate Commerce.

We now return to the significance of interstate transportation prior to 1959. The defendants have urged that even though a small part of the time spent by the plaintiffs while in the employ of the defendants was spent in interstate shipments this would make all of their employment exempt from the application of the Fair Labor Standards Act. The case of Morris vs. McComb held that even though less than 4% of the shipments of the employer were in Interstate Commerce, where the employees were engaged indiscriminately in that activity they were covered by the Motor Carrier Act and exempt from the Fair Labor Standards Act. This case was followed in the case of Rogers Cartage Company vs. Reynolds, 166 Fed. 2nd 317, where the Court held an employee who had spent 39 out of 55 weeks engaged intra-state shipments to nevertheless be covered by the Motor Carrier Act and

exempt from the Fair Labor Standards Act. If the plaintiffs had engaged in even an occasional shipment in interstate commerce during the years 1959 and 1960 there would be no question about their being exempt from the provisions of the Fair Labor Standards Act. But they did not do that, and hindsight now enables us to see that there was a complete change in the method of operation beginning with January, 1959. The Court feels that they were no longer covered by the Motor Carriers Act on January 1, 1959, and that from that time forward they were subject to the provisions of the Fair Labor Standards Act.

Section 207 of the Fair Labor Standards Act indicates that the basis for determining hours shall be weekly, since it provides that "No employer shall employ any of his employees . . . for a work week longer than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 1½ times the regular rate at which he is employed."

It follows therefrom that Plaintiff Mulder shall have judgment for $2,220.90, Plaintiff Woodall shall have judgment for $2,240.03, and Plaintiff Riddle shall have judgment for $1,885.77.

Normally an employee is entitled to liquidated damages equal to the amount of overtime pay which he should have been paid. It is provided, however, in 29 U.S.C.A. 260, "If the employer shows to the satisfaction of the Court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards

Act of 1938 as amended, the Court may in its sound discretion award no liquidated damages or award any amount thereof not to exceed the amount specified in Section 216(b) of this Title." Here it is urged that based upon this section the Court should not make an award of liquidated damages. It is well established that the burden of showing good faith is upon the defendants in an action such as this.

See Parks vs. Pucket, 154 Fed. Supp. 842, 850.

It is stated in Rothman vs. Publicker Industries, Inc., 201 Fed. Reporter 2nd 618, 620, after quoting the above section of the United States Code, as follows:

> "We understand this language to impose upon the delinquent employer who had escaped the payment of liquidated damages a plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict."

In that opinion the court approves the language of the District Court, which reads as follows:

> "The utmost that could be derived from the evidence in this respect is that the employer had the bona fide belief that the plaintiff was within the exempt class. It is well settled that reasonable cause in the portal to portal act means more than that. The Court has no option other than to add liquidated damages and counsel fees to the verdict."

Based upon these authorities the Court is of the opinion that it has no option but to add liquidated damages to the verdict in an amount equal to the overtime pay. In addition, the Court is obligated by

the Act to make an award of attorney's fees to the plaintiffs. The Court is of the opinion that $500.00 is a reasonable attorney's fee for each plaintiff in this action.

This brings us to the breakdown claim of Riddle. The Court finds it difficult to understand defendants' claim that Riddle is not entitled to standby time during breakdowns. It seems to the Court that it is immaterial that the employer had no practice of paying for breakdown time. The Court feels that defendant Riddle has adequately established his claim to breakdown time in the sum of $511.92, but that neither attorney's fees nor a penalty would be appropriate in this instance for it is not shown that this breakdown time amounted to either overtime time not included in the previous award or any other form of compensation within the Fair Labor Standards Act. Actually this award is based upon an implied contract to pay the employee for time spent for the benefit of the employer and is not based upon the Fair Labor Standards Act as are the rest of the claims in this action.

The plaintiffs will prepare findings of fact and conclusions of law consistent with this opinion and the matter will be on the Court's Calendar for the settlement thereof on December 20, 1962.

Dated this 20th day of November, 1962.

Robert L. Winslow
Judge

Filed Nov. 23, 1962
W. J. Broaddus, County Clerk
By M.H., Deputy

[Title of Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial on the 30th day of April, 1962, before the court sitting without a jury, a jury having been expressly waived, Thomas F. Cleland appearing as counsel for the plaintiffs, and Timothy O'Brien appearing as counsel for the defendants, and the court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the court for decision, and the court being fully advised in the premises now makes its findings of fact as follows:

Findings of Fact

1. That it is true that at all times herein mentioned defendants were engaged in the buying, processing, selling and transportation at wholesale and retail of lumber and forest products. That at said times, defendants were subject to the laws of the State of California and to the provisions of the Fair Labor Standards Act enacted by the United States Congress. That it is true that during the years 1959 and 1960, the plaintiffs herein were employed by defendants as truck drivers and while so employed, plaintiffs, at various times and in various weeks, worked in excess of forty (40) hours per week. That for said hours of overtime, plaintiffs were entitled to time and a half whereas plaintiffs were paid only straight time. That the hourly compensation of plaintiffs at straight time was $2.37 per hour or more. That the amount of un-

paid wages due plaintiff Albert E. Mulder is the sum of $2,220.90. That the amount of unpaid wages due plaintiff Robert B. Riddle is the sum of $1,885.77. That the amount of unpaid wages due plaintiff Arthur O. Woodall is the sum of $2,240.03. That each of said plaintiffs is entitled to said sums. That the same has been demanded from defendants, but they have refused to pay said sums to plaintiffs. That it has become necessary for plaintiffs and each of them to employ an attorney to prosecute this action. That the sum of $500.00 is a reasonable sum to allow for each plaintiff herein for the services rendered by said attorney. That the total of said sum so allowed is the sum of $1500.00. That it is true that the failure of said employers to pay said overtime is a violation of law and said employers are therefore liable to said employees, the plaintiffs herein, in an additional amount to the unpaid wage as liquidated damages.

2. That it is true that Robert B. Riddle while in the employ of defendants worked a total of 216 hours for which he received no pay whatsoever. That the current rate of pay at the time was $2.37 per hour. That the wages due and unpaid to said plaintiff is the sum of $511.92. That the defendants are indebted to plaintiffs in the sum of $511.92 for said unpaid wages.

From the foregoing facts, the court concludes:

Conclusions of law

1. That plaintiff Albert E. Mulder is entitled to judgment against defendants in the sum of $2,220.90 for unpaid overtime wages plus interest at the rate of

7% per annum from June 1, 1961, plus the sum of $2,220.90 as liquidated damages plus the sum of $500.00 for attorney's fee, plus costs.

2. That the plaintiff Robert B. Riddle is entitled to the sum of $1,885.77 unpaid overtime wages plus interest at the rate of 7% per annum from June 1, 1961, plus the sum of $1,885.77 as liquidated damages plus the sum of $500.00 attorney's fees plus the sum of $511.92 unpaid wages with interest from June 1, 1961, together with his costs of suit.

3. That plaintiff Arthur O. Woodall is entitled to the sum of $2,240.03 unpaid wages plus the interest thereon at the rate of 7% per annum from June 1, 1961, plus the sum of $2,240.03 liquidated damages plus the sum of $500.00 attorney's fees together with his costs.

Let judgment be entered accordingly.

Dated: This 21 day of December, 1962.

Robert J. Winslow
Judge of the Superior Court

PROOF OF SERVICE

State of California
County of Mendocino.—ss.

I, the undersigned, declare under penalty of perjury:

That I was at the time of the service of the papers herein referred to, over the age of eighteen years and not a party to the within entitled action.

That on November 30, 1962, I served a true copy of the Findings of Fact and Conclusion of Law in the above entitled action on Katherine Shanyfelt, legal secretary for Timothy O'Brien, Attorney for Defendants, 150 North Pine Street, Ukiah, California.

Dated: November 30, 1962.

Sharon Johnson

Filed Dec. 21, 1962
W. J. Broaddus, County Clerk
By M.M., Deputy

[Title of Court and Cause]

JUDGMENT

This cause came on regularly for trial before the court sitting without a jury on the 30th day of April, 1962, Thomas F. Cleland appeared as attorney for the plaintiffs, and Timothy O'Brien appeared as attorney for the defendants, and the Court having heard the testimony and having examined the proofs offered by the respective parties and the Court being fully advised on the premises and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid;

It is hereby Ordered, Adjudged and Decreed:

1. That plaintiff Albert E. Muldér have judgments against the defendants and each of them the sum of $2,220.90 with interest thereon at the rate of 7% per annum from June 1, 1961, and the further sum of $2,720.90 with interest thereon at the rate of 7% per annum from date hereof until paid.

2. That plaintiff Robert B. Riddle have judgment against the defendants and each of them in the sum of $1,[illegible]77 plus interest thereon at the rate of 7% per annum from June 1, 1961, and the further sum of $2,897.69 with interest thereon at the rate of 7% per annum from date hereof until paid.

3. That plaintiff Arthur O. Woodall have judgment against the defendants and each of them in the sum of $2,240.03 with interest at the rate of 7% per

annum from June 1, 1961, and judgment for the further sum of $2,740.03 with interest thereon at the rate of 7% per annum from date hereof until paid.

4. That plaintiffs have judgment against the defendants for their costs herein taxed at $.....

Dated: This 21 day of December, 1962.

Robert L. Winslow
Judge of the Superior Court

PROOF OF SERVICE

State of California
County of Mendocino.—ss.

I, the undersigned, declare under penalty of perjury:

That I was at the time of the service of the papers herein referred to, over the age of eighteen years and not a party to the within entitled action.

That on November 30, 1962, I served a true copy of the Judgment in the above entitled action on Katherine Shanyfelt, legal secretary for Timothy O'Brien, Attorney for Defendants, 150 North Pine Street, Ukiah, California.

Dated: November 30, 1962.

Sharon Johnson

Filed Dec. 21, 1962
W. J. Broaddus, County Clerk
By M.M., Deputy

Judgments Book 38 Page 331
Entered Dec. 21, 1962

In the District Court of Appeal
State of California
First Appellate District

DIVISION TWO

---

1 Civil No. 21,307

Albert Mulder, Robert B. Riddle, and Arthur O. Woodall,
Plaintiffs and Respondents,

vs.

Mendo Wood Products, Inc., E. C. Welch and J. D. Welch, Jr.,
Defendants and Appellants.

OPINION

This is an action by three former employees of defendant Mendo Wood Products, Inc., to recover wages allegedly due them under the Fair Labor Standards Act of 1938 (29 U.S.C.A., §§ 201 et seq.). The complaint alleged that plaintiffs Albert Mulder, Albert Woodall, and Robert Riddle, were each employed as truck drivers by the defendant for specified periods during the years 1959 and 1960; that each of the plaintiffs worked a considerable number of hours in excess of 40 hours per week; that at the times such employment was performed, defendant was subject to the provisions of the Fair Labor Standards Act and

was required to pay plaintiffs time-and-a-half for their hours of overtime; that defendant had in fact paid plaintiffs only straight time and that they were therefore entitled to recover the difference between time-and-a-half and straight time for the hours of overtime worked, liquidated damages in an equal amount, and attorney's fees. In addition, plaintiff Riddle alleged that during the years 1959 and 1960, he had worked a number of hours in the defendant's employ for which he had received no pay whatever. He sought straight wages for the hours so worked, liquidated damages in an equal amount, and attorney's fes.

The defendant answered, admitting that it was subject to the Fair Labor Standards Act at the times mentioned in the complaint, and that it had employed plaintiffs as truck drivers during the periods alleged. As an affirmative defense to each cause of action, defendant alleged that it was a private carrier of property by motor vehicle within the meaning of Part II of the Interstate Commerce Act (49 U.S.C.A., §§ 301 et seq.); that plaintiffs were employees with respect to whom the Interstate Commerce Commission had the power to establish qualifications and maximum hours of service pursuant to said act; and that plaintiffs were accordingly exempted from the maximum hours and overtime provisions of the Fair Labor Standards Act by section 13, subdivision (b)(1) of said act (29 U.S.C.A., § 213(b)(1)).

The evidence established that defendant was a California corporation engaged in the manufacture and

sale of studs, and that its principal place of business was located at the Ridgewood Ranch in Ukiah, California. In order to deliver its studs to purchasers, the defendant used trucks which it leased from other companies and which were operated by drivers in its own employ. Plaintiff Mulder was employed by the defendant as a truck driver during the period from January 1, 1959 through September 15, 1960; plaintiff Woodall, during the period from January 1, 1959 through July 15, 1960; and plaintiff Riddle, during the period from January 1, 1959 through August 15, 1960. Time cards covering the periods in question showed that each of the plaintiffs had worked a substantial number of hours in excess of 40 hours per week, for which they were paid only straight time. Computations based upon these time cards demonstrated that the difference between straight time and time-and-a-half pay for the total number of overtime hours worked came to $2,222.90 in the case of plaintiff Mulder; $2,240.33 in the case of plaintiff Woodall; and $1,885.77 in the case of plaintiff Riddle. In addition, plaintiff Riddle, during the period from May 1, 1959 through July 31, 1960, spent 216 hours attending his truck during breakdowns on the road and received no compensation whatever for this time. Straight time pay during the period in question was $2.37 per hour.

The evidence relative to the interstate character of defendant's trucking operations revealed that in the year 1958, defendant's drivers did transport shipments of studs to various out-of-state destinations. It was conceded by the defendant, however, that no out-of-

state deliveries were made during 1959 or 1960. The testimony pertaining to the defendant's reason for discontinuing these deliveries was somewhat conflicting. Elwood Welch, the secretary of defendant corporation, testified that there had been no change of company policy commencing in the year 1959, and that the defendant was at all times willing to sell and deliver its studs to both in-state and out-of-state buyers. Plaintiff Mulder testified, however, that there had been a definite change in delivery procedures subsequent to 1958 and that the defendant henceforth arranged to have its out-of-state buyers come to the Ridgewood Ranch and pick up the studs ordered in their own trucks. He also testified that the defendant did not have either an Interstate Commerce Commission permit or Interstate Commerce Commission plates for its trucks.

In any event, all of the hauls made by defendant's drivers during the years 1959 and 1960 were between two points within the State of California. In the majority of cases, the drivers would pick up studs at the Ridgewood Ranch and deliver them to various tracts under construction and to retail or wholesale lumber dealers. Although the defendant introduced evidence to the effect that certain of these wholesale dealers ultimately shipped some of the defendant's studs to out-of-state retail buyers, there was no evidence that such shipments were part of any continuous out-of-state movement commencing at the Ridgewood Ranch. To the contrary, plaintiff Mulder testified that the bills of lading or waybills showed the ultimate

destination of the loads delivered by defendant's drivers to be the lumber yard of the particular California wholesaler. Mr. Welch himself confirmed this testimony, and stated that the defendant's duties with regard to its studs ceased upon delivery to an in-state wholesale customer, that the defendant did not undertake to tell its wholesale customers what to do with the studs, and that any further shipment of the studs was dictated by the wholesaler's own requirements and by orders which it might receive from its own out-of-state customers.

In addition to the intrastate shipments to tracts and to retail and wholesale lumber dealers, there was also evidence that the defendant's drivers were occasionally required to haul studs, by way of private road, from the defendant's stud mill to a railroad siding also located on the Ridgewood Ranch, where the studs were loaded on cars and shipped to various out-of-state destinations. The total distance from the mill to the siding was some 1½ to 2 miles.

There was also evidence that sometime during 1959, defendant's drivers delivered the component parts for a feed mill from the Miller Manufacturing Company in Modesto, California, to the Ridgewood Ranch, and that certain of these parts had been manufactured in other states. The feed mill machinery had been ordered by Welch & Welch, a partnership, whose principal place of business was also located at the Ridgewood Ranch and whose members were identical with the shareholders of defendant corporation. Mr. Welch testified that the two companies frequently exchanged

equipment and labor and that defendant corporation had provided the trucks and drivers to pick up and deliver the feed mill parts ordered by Welch & Welch. Mr. Thompson, the president and general manager of the Miller Manufacturing Company, testified that Welch & Welch had ordered the parts for the feed mill from his company, that certain of the parts had been manufactured by his company in Modesto and other parts had been ordered from out-of-state manufacturers. Mr. Thompson also testified that certain of the parts manufactured outside the state had been purchased by his company from dealers within the state, and that other parts which had been ordered directly from out-of-state sources were stored by his company for some five or six months before being sold to a particular in-state customer.

Upon this evidence, the trial court found that during the years 1959 and 1960, the defendant was subject to the provisions of the Fair Labor Standards Act and had employed plaintiffs as truck drivers; that at various times during these years, plaintiffs had worked in excess of 40 hours per week; that although plaintiffs were entitled to time-and-a-half for the hours so worked, defendant paid them only straight time; that plaintiff Mulder was entitled to unpaid wages in the amount of $2,220.90, plaintiff Woodall to unpaid wages in the amount of $2,240.03, and plaintiff Riddle to unpaid wages in the amount of $1,885.77; that defendant's refusal to pay the amounts due had necessitated the bringing of the instant action and that $500 was a reasonable amount to allow each plaintiff

for attorney's fees; that plaintiffs were also entitled to liquidated damages in the amount of their unpaid wages. The court also found that plaintiff Riddle had worked 216 hours for which he received no pay whatever, that his wages at that time were $2.37 per hour, and that he was entitled to recover the sum of $511.92. Judgment was accordingly entered and defendant appealed therefrom.[1]

Appellant first contends that its trucking operations were exempt from the wage and hour provisions of the Fair Labor Standards Act by virtue of section 13, subdivision (b)(1) of said act (29 U.S.C.A., § 213(b)(1)), which provides in relevant part that "The provisions of section 207 of this title shall not apply with respect to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49 . . ."

Section 304, subdivision (a)(3) of Title 49 (49 U.S.C.A., § 304(a)(3)), provides that "It shall be the duty of the Commission . . . [t]o establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment." Pursuant to section 303, subdivision (a)(17) (49 U.S.C.A., § 303(a)(17)),

[1]Although the notice of appeal actually provided that "defendants Mendo Wood Products, Inc., E. C. Welch and J. D. Welch, Jr., hereby appeal . . . from said judgment," the latter two individuals appear to have abandoned their appeal and have filed no briefs with this court.

". . . [t]he term 'private carrier of property by motor vehicle' means any person . . . who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise." Pursuant to section 303, subdivision (a)(13) (49 U.S.C.A., § 303(a)(13)), ". . . [t]he term 'motor vehicle' means any vehicle . . . used upon the highways in the transportation of passengers or property . . ." Section 303, subdivision (a)(12) (49 U.S.C.A., § 303(a)(12)), provides that ". . . [t]he term 'highway' means the roads, highways, streets, and ways in any State."

The application of the exemption set forth in section 13, subdivision (b)(1) of the Fair Labor Standards Act is determined solely by the existence of power to regulate in the Interstate Commerce Commission and it is not necessary for the commission to have exercised this power and actually established qualifications and maximum hours of service. (Levinson v. Spector Motor Co. (1947) 330 U. S. 649, 661.)

Appellant asserts that it clearly qualified as a "private carrier of property by motor vehicle" subject to the commission's power to regulate because the interstate character of its operations was conclusively established by evidence that (1) appellant's trucks were driven to out-of-state destinations prior to 1959 and no change in company policy occurred in 1959; (2) appellant's trucks delivered studs to wholesale lumber dealers who subsequently "transhipped" these studs

to out-of-state destinations without reprocessing; (3) appellant's trucks carried machinery from the Miller Manufacturing Company in Modesto to the Ridgewood Ranch, and certain of this machinery was ordered from out-of-state manufacturers; and (4) appellant's trucks carried studs to railroad sidings, where such studs were loaded and shipped to out-of-state destinations.

Taking these contentions in order, it is apparent that the testimony pertaining to the presence or absence of a change in company policy regarding out-of-state deliveries presented a question of fact for the trial court. Although appellant's secretary testified that no such change occurred, there was evidence that appellant had arranged to have its out-of-state buyers pick up their studs at appellant's mill at all times subsequent to 1958 and that appellant made no single out-of-state delivery during 1959 and 1960. Under such circumstances, it clearly cannot be said that the evidence was insufficient as a matter of law to support a finding that here had been a change in company policy and that appellant had deliberately discontinued its out-of-state deliveries after 1958.

The evidence that appellant delivered its products to California wholesalers, some of whom ultimately reshipped the products out of state, similarly does not suffice to render appellant a private carrier subject to the regulatory powers of the Interstate Commerce Commission. Since the evidence clearly indicated that appellant had no further interest in its studs following sale and delivery to California wholesalers, it is appar-

ent that appellant did not participate in any continuous movement of products into interstate commerce. In Dallum v. Farmers Co-Operative Trucking Ass'n. (D. Minn. 1942) 46 F. Supp. 785, the court held that butter which was delivered to a distributing center and stored until such time as it could be transported to customers was not in interstate commerce until such time as it left the distributing center enroute to out-of-state customers. Although the butter was transported to the distributing center with knowledge that it might eventually be shipped out of state, no further movement of the butter to any particular person was contemplated and delivery was dependent upon the demands of customers. The court stated, "Mere intention by the owner to place goods in interstate commerce, or the gathering of goods at a depot for that purpose, is not sufficient. It must appear that the goods have entered upon transportation to another state before it can be said that they are in interstate commerce." (Pp. 787-788.)

In the present case, the record is devoid of any evidence that appellant's studs were already destined for a particular out-of-state customer at the time they left the Ridgewood Ranch. The evidence establishes, to the contrary, that appellant sold its studs only to California wholesalers and that it had no foreknowledge of the fact that certain of its studs might ultimately be shipped out of state.

Appellant's delivery of feed mill parts to the Ridgewood Ranch presents the converse situation. The evidence reveals that the machinery in question was

ordered by Welch & Welch from the Miller Manufacturing Company in Modesto, California. Although it is true that certain of these parts were ordered by the Miller Manufacturing Company from out-of-state sources, there is no indication in the record that either Welch & Welch or appellant and its drivers were aware of this fact. In addition, there was evidence to the effect that certain of the parts which had been manufactured out of state were either obtained from California suppliers or were retained in the warehouse of the Miller Manufacturing Company for several months prior to their delivery to the Ridgewood Ranch. Under such circumstances, we believe the trial court would be justified in concluding that the parts in question were no longer in interstate transit when they were picked up by appellant's trucks. Moreover, in our opinion an isolated incident of this nature is not sufficient to render appellant and its employees subject to the regulatory powers of the Interstate Commerce Commission.

The deliveries to the local railroad siding on the Ridgewood Ranch appear to fall directly within the holding of Henry W. Robertson Contract Carrier Application (1942) 34 I.C.C. Reports, Motor Carrier Cases, No. M.C. 96212. In that case, the applicant sought a permit authorizing his operation in interstate or foreign commerce as a contract carrier by motor vehicle. The evidence revealed that the applicant transported zinc and lead concentrates from the mine bins to cars at railroad sidings, where they were loaded and shipped to out-of-state points. The ship-

ments from the mines to the sidings covered distances of not more than two miles and were entirely intrastate and over private rights of way. These shipments were made, however, with the intent to transport the concentrates in a continuous movement to out-of-state destinations. The commission nevertheless held that the applicant was not subject to its regulatory powers. In so holding, the commission pointed out that Part II of the Interstate Commerce Act, from which it derived its powers, defined "motor vehicle" as "any vehicle . . . used upon the highways . . ." (see 49 U.S.C.A., § 303(a)(13)) and further defined "highway" as "the roads, highways, streets, and ways in any State" (see 49 U.S.C.A., § 303(a)(12)). Since the applicant shipped his goods only over private rights of way, he did not qualify as a contract carrier "by motor vehicle" within the meaning of the act.

In the instant case, appellant's drivers similarly made practically all of their trips to the railroad siding entirely over a private road on the Ridgewood Ranch, the only exception occurring when the load was of such an unusual size that it would not go through the underpass beneath Highway 101, at which time, for a short distance, the trucks would traverse said highway. It is also to be noted that said highway traversed the Ridgewood Ranch, the owner of the fee to the area over which the state enjoyed an easement for the purpose of the highway use.

Appellant strenuously argues that the trial court's method of computation fails to comply with the Fair Labor Standards Act and demands a reversal of the

judgment on this ground alone. We have read the testimony and examined the exhibits offered on behalf of plaintiffs, and we find no support for such contention. The appellant ignores the fact that we are faced here not with persons working a set five-day week with an eight hours per day schedule of employment, but rather truck drivers who worked a seven-day week with only an occasional day off each month, if fortunate, and whose pay was based on an hourly rate requiring the truck to be moving, refueling, loading or unloading, the hours of pay necessarily varying with the distance from the plant to the place of delivery. The trial court's adoption of plaintiffs' allowance of 80 or 88 hours for each pay period was more than fair to appellant, for we can readily see how by reason of breakdown of the equipment or other delays a driver could, during a seven-day week, only be entitled to straight time well below 40 hours and yet in the following week be so continuously occupied that his compensable time would run many hours beyond the straight time period of 40 hours, yet under the computation here used would sacrifice overtime hours to make up the deficit below the 40 hours in the previous week before setting the number of his compensable overtime hours. Such advantage enjoyed by the appellant furnishes no valid ground for complaint. If appellant wished a more detailed method of computation, it had its opportunity to develop the same, for it was from its records that the figures arrived at by the trial court were deduced.

Appellant next contends that the court erred in awarding respondents penalties in an amount equal to

the unpaid overtime wages found to be due them. Appellant asserts that the record contains uncontroverted evidence that its failure to pay its employees time-and-a-half for overtime was due to its good faith belief that it was not subject to the wage and maximum hour provisions of the Fair Labor Standards Act. Under such circumstances, appellant contends that the award of penalties must be reversed.

Pursuant to section 207, subdivision (a)(1) of the Fair Labor Standards Act (29 U.S.C.A., § 207(a)(1)), "no employer shall employ any of his employees . . . for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed . . ."

Section 216, subdivision (b) (29 U.S.C.A., § 216(b)) provides that "Any employer who violates the provisions of . . . section 207 . . . shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages."

Section 260 of the Portal-To-Portal Act (29 U.S.C.A., § 260), upon which appellant relies, provides that "In any action commenced prior to or on or after May 14, 1947 to recover . . . unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation

of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216(b) of this title."

In order to escape payment of liquidated damages, pursuant to the section above quoted, the employer must sustain the plain and substantial burden of persuading the court by proof that his failure to obey the Fair Labor Standards Act was both in good faith and predicated upon such reasonable ground that it would be unfair to impose upon him more than a compensatory judgment. (Wright v. Carrigg (C.A.S.C. 1960) 275 F. 2d 448.)

In the present case, appellant has failed to direct this court's attention to any testimony demonstrating that appellant had reasonable grounds for believing that it was not required to pay its employees the overtime compensation required under the Fair Labor Standards Act. Although appellant now asserts that it was under the belief that its interstate activities rendered it subject to Part II of the Interstate Commerce Act and thereby exempted it from the wage and maximum hour provisions of the Fair Labor Standards Act, this contention is not borne out by the record, which reveals that appellant made no interstate truck shipments during the years 1959 and 1960, and that appellant never applied for or received an Interstate Commerce Commission permit or plates. The only testimony bearing directly upon appellant's good faith belief that it was exempt from the wage and maximum hour provisions of the Fair Labor Stand-

ards Act consisted of Mr. Welch's statement that he had always considered lumber "an interstate article" regardless of where it was shipped or what was done with it. Under such circumstances, it cannot be said that the court abused its discretion in awarding respondents liquidated damages.

Appellant's next contention is that there is no support in the evidence for respondent Riddle's award of $511.92 as compensation for the hours spent with his truck during breakdowns. We agree. An examination of the findings fails to reveal the precise basis for this award, since the findings, as above noted, merely state that respondent Riddle had worked a specified number of hours and was entitled to recover wages therefor. The trial court's memorandum opinion, however, indicates that this award was predicated upon an implied contract theory whereby appellant employer impliedly agreed to pay his employees for all time spent on its behalf. Since the Fair Labor Standards Act contains no provisions specifically requiring the payment of "breakdown time," it would appear that this implied contract theory constitutes the only basis, if any, upon which the award could be upheld.

However, a thorough review of the record fails to disclose any evidence of such an implied contract. Respondent Riddle testified that he had never discussed payment for breakdown time with appellant, and that he had always been paid only for actual driving time, for fuel time, and for loading and unloading. He also stated that the trucks were equipped with clocks which recorded the hours during which the truck was in motion and which stopped when the truck

was at rest. He stated that he was always paid for the time recorded on the disc and for any additional time spent in fueling, loading and unloading; that he never asked appellant to pay him for his breakdown time; and that he continued to work for appellant knowing that he would receive no compensation for this time.

In view of this evidence, there is no justification for the award of breakdown time to respondent Riddle. Civil Code, section 1620, states that "An express contract is one, the terms of which are stated in words." Civil Code, section 1621, provides that "An implied contract is one, the existence and terms of which are manifested by conduct." It is settled that both types of contract are identical in that they require a meeting of the minds or an agreement. (Desny v. Wilder (1956) 46 Cal. 2d 715, 735.) The true implied contract consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words. (Silva v. Providence Hospital of Oakland (1939) 14 Cal. 2d 762, 773.)

In the instant case, there is a complete absence of any evidence indicating that appellant and respondent Riddle ever arrived at an agreement that appellant would pay respondent Riddle for his breakdown time. To the contrary, the evidence is strongly indicative of an implied agreement that no such compensation would be paid. Under such circumstances, the award of $511.92 to respondent Riddle may not be upheld.

Appellant next contends that the trial court failed to make findings of fact on all material issues raised.

by the pleadings and evidence. Appellant asserts, more specifically, that the trial court failed to make any finding that appellant was not exempt from the overtime provisions of the Fair Labor Standards Act; that the court failed to find the number of hours worked by each respondent in excess of 40 hours per week; and that the court failed to find whether appellant acted in good faith in failing to pay respondents time-and-a-half for the overtime hours worked.

The findings that appellant was subject to the Fair Labor Standards Act during the years 1959 and 1960 and that respondents were entitled to recover time-and-a-half pay and liquidated damages for the overtime hours worked negate by necessary inference appellant's claim that it was exempt from the wage and hour provisions of the Fair Labor Standards Act. (Kux v. Cal-West Lumber Corp. (1958) 162 Cal. App. 2d 500, 505; Petersen v. Murphy (1943) 59 Cal. App. 2d 528, 534.) Since the court found the total amount of overtime pay due each respondent and since such findings are statements of ultimate fact (Nisbet v. Rhinehart (1935) 2 Cal. 2d 477, 482), the court was not required to make additional findings relative to evidentiary matters such as the number of overtime hours worked by each respondent. (People v. Hecker (1960) 179 Cal. App. 2d 823, 832; Gross v. Needham (1960) 184 Cal. App. 2d 446, 463.) A finding that appellant did not act in good faith when it failed to pay respondents the required overtime compensation would appear unnecessary in view of the finding that respondents were entitled to liquidated damages. (Kux v. Cal-West Lumber Corp., supra; Petersen v.

Murphy, supra. In any event, appellant did not plead the defense of good faith and offered no evidence pertaining thereto.

Appellant's final contention is that the findings of fact, conclusions of law and judgment are unsupported by the evidence in two respects: (1) that respondents failed to prove the amount of overtime pay to which they were entitled, and (2) that the judgment was made to run against E. C. Welch and J. D. Welch, Jr., as well as against appellant. The first of these arguments is without merit, since as above noted, respondents supported their wage claims by time cards covering their total periods of employment during 1959 and 1960 and by itemized computations based upon those time cards.

Appellant's second contention raises a more serious problem. An examination of the pleadings and pretrial conference order fails to disclose that the action was brought against any other defendant than appellant Mendo Wood Products, Inc. At the commencement of the trial, however, respondents' attorney suggested a stipulation to the effect that appellant Mendo Wood Products, Inc. was in the process of dissolution and that Jeff Welch and Elwood Welch had agreed that any judgment which might be entered in the action would be binding on them. Counsel for appellant stated that he had given counsel for respondents a written guarantee but that he had no authority to file it in the action. At a subsequent stage in the proceedings, the subject was again broached, and appellant's counsel reiterated that there was a guarantee, that

respondents' counsel had a copy, that it covered any judgment that might be rendered in the within action, but went no further.

On December 21, 1962, judgment in favor of respondents was entered against appellant Mendo Wood Products, Inc. Notice of appeal from this judgment was filed on behalf of Mendo Wood Products, Inc., E. C. Welch and J. D. Welch, Jr. The latter two individuals, as above noted, took no further steps to perfect their appeal. On March 15, 1963, the court entered a new judgment in order to eliminate an award of interest which had inadvertently been inserted in the original judgment. The amended judgment ran against defendants "Mendo Wood Products, Inc., E. C. Welch, and J. D. Welch, Jr." Although this judgment is not a part of the record in the instant appeal, it is this judgment which appellant Mendo Wood Products, Inc. now attacks on the ground that it was erroneously made to run against the Welches. It is settled that an appellant may not on his appeal urge errors which affect only his coparties who do not appeal, and that such errors can be reviewed only at the instance of the parties affected thereby. (Estate of Nepogodin (1955) 134 Cal. App. 2d 161, 173; Broadway Fed. etc. Loan Assoc. v. Howard (1955) 133 Cal. App. 2d 382, 400.) Since the Welches chose to abandon their appeal, their rights cannot be asserted by appellant Mendo Wood Products, Inc. as a ground for reversal.

Respondents' motion to dismiss this appeal, on the ground that it was taken from a judgment which is

nonappealable by virtue of having been superseded by a new and different judgment, is denied.

In the present case, it is clear to us that the trial judge never intended the judgment to include an award of interest. It was by inadvertence that the judge signed this judgment, prepared by respondents' counsel, which awarded interest. Upon being brought to the court's attention, respondents immediately conceded the error and the matter was corrected.

It is settled that where the amendment merely corrects a clerical error and does not involve the exercise of judicial discretion, the original judgment remains effective and unimpaired and the amendment does not operate as a new judgment from which a new appeal may be taken. (O'Connor v. Skelton (1961) 195 Cal. App. 2d 612, 614-615; McConville v. Superior Court (1926) 78 Cal. App. 203, 207; George v. Bekins Van & Storage Co. (1948) 83 Cal. App. 2d 478, 480-481.)

For the reasons above stated, the judgment is modified by reducing the amount of damages awarded respondent Riddle from $4,783.46 to $4,271.54, and as so modified, the judgment is affirmed.

Shoemaker, P. J.

We concur:

Agee, J.

Taylor, J.

Filed March 17, 1964.

Lawrence R. Elkington, Clerk.

In the District Court of Appeal
State of California
First Appellate District

DIVISION TWO

---

1 Civil No. 21,307

Albert Mulder, Robert B. Riddle, and Arthur O. Woodall,
Plaintiffs and Respondents,
vs.
Mendo Wood Products, Inc., E. C. Welch and J. D. Welch, Jr.,
Defendants and Appellants.

BY THE COURT

The Petition for a Rehearing filed in the above entitled cause is hereby denied.

Dated, April 16, 1964

Shoemaker, P. J.

Filed April 16, 1964.
Lawrence R. Elkington, Clerk.

Order due
May 15, 1964

In the Supreme Court of the State of California

In Bank

Albert Mulder, Robert B. Riddle, and Arthur O. Woodall,
Plaintiffs and Respondents,
vs.
Mendo Wood Products, Inc., E. C. Welch and J. D. Welch, Jr.,
Defendants and Appellants.

ORDER DENYING HEARING
AFTER JUDGMENT
BY DISTRICT COURT OF APPEAL
1st District, Division 2, Civil No. 21,307

Appellant's petition for hearing DENIED.

Schauer, J., is of the opinion that the petition should be granted.

Gibson, Chief Justice

Filed May 13, 1964.
Lawrence R. Elkington, Clerk.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby cer-

tify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 13 day of May, A.D. 1964.

William I. Sullivan, Clerk,
By G. E. Bishel,
Deputy Clerk.

Filed May 13, 1964,
William I. Sullivan, Clerk.

Appendix B

Each of the following federal statutes have been referred to in the foregoing petition. Each is extensive, but only small portions are relevant to the matters presented in the petition. This Appendix B contains such relevant provisions in exact quotation form.

CONSTITUTION OF THE UNITED STATES

(As printed in United States Code, Annotated)

Section 8. Clause 3. *Regulation of Commerce*.

The Congress shall have Power * * * To regulate Commerce * * * among the several states, * * *

Amendment XIV, Citizenship; Privileges and Immunities; Due Process; Equal Protection; * * * Enforcement. (As printed in United States Code, annotated.)

> Section 1: * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

Title 28, U.S.C., *Judiciary and Judicial Procedure*. Section 1257, in pertinent part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

permit averaging of hours over two or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the ten (10) overtime hours worked in the second week, even though the average number of hours worked in the two weeks is 40.[1]

Sec. 785.0(a) The Fair Labor Standards Act * * * also provides that no such employee may be employed for more than 40 hours a week without receiving at least time and one-half of his regular rate of pay for the overtime hours. The amount of money an employee should receive cannot be determined without knowing the number of hours he has worked."[2]

[1]Also contained in Title 29, Labor, Code of Federal Regulations, Section 778.2 (c) and (d).

[2]Also contained in Title 29 Code of Federal Regulations, Section 785.0, until that section was renumbered as 785.1 by 26 Federal Regulations 7732, August 18, 1961, and the language slightly changed, but not in such manner as to affect this litigation.